Filed 7/23/20 P. v. Flores CA3 (unmodified opinion attached)

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMIAN LUIS FLORES et al.,

Defendants and Appellants.

C080799

(Super. Ct. No. 13F07733)

ORDER MODIFYING
OPINION AND DENYING
REHEARING
[NO CHANGE IN
JUDGMENT]

THE COURT:

In response to defendant Damian Luis Flores's petition for rehearing, the court makes the following modifications to its opinion filed on June 26, 2020:

- 1. On page 35 of the opinion, subheading III A. and the first line after the subheading are amended to read as follows:
- A. Instruction on Murder Based on Natural and Probable Consequences

 The prosecutor argued that Flores was guilty of murder by aiding and abetting the commission of a felony, the natural and probable consequence of which was murder.
- 2. The fourth full paragraph on page 38 of the opinion starting with the words "The following morning" is deleted and replaced with the following:

The following morning, the parties conferred in chambers. Because that hearing was not reported, the parties, including appellate counsel, and the court met after trial to prepare a settled statement on whether counsel had objected to the court's proposed response to the jury question. The parties agreed that the transcript of the later hearing would be the settled statement of the unreported hearing.

According to the settled statement, Mr. Staten, trial counsel for Flores, appeared for Flores and Caballero at the unreported hearing. Mr. Staten argued the court could not inform the jury whether discrediting a witness constituted witness intimidation because the court did not know what the jury meant by its question. The jury had misspelled a word, "discreteting" [sic], and, assuming the jury meant to say "discrediting," the court did not know what set of facts of discrediting a witness the jury sought to know constituted witness intimidation. We quote from the settled statement:

"MR. STATEN: I believe that – what happened in the back is that I probably did state that we couldn't tell them that discrediting a witness constituted witness intimidation because they had spelled a word wrong.

"THE COURT: The discrediting.

"MR. STATEN: Right. And so we figured what they meant is if you discredit a witness, could that be witness intimidation. I think that's what we were talking about.

"THE COURT: Right.

"MR. STATEN: We were trying to figure out what they were saying with that word.

"And I don't think that there was a formal objection. I think we had the discussion I didn't want them to be told that and so I think we agreed on your question calls for a factual determination that needs to be decided by the jury.

"THE COURT: Right, because their question called for a yes or no answer.

"MR. STATEN: Right.

"THE COURT: And you wanted to make sure that we do not answer that in the affirmative to say, yes, it does constitute witness intimidation as a matter of law because it's up to them to apply the jury instruction to determine whether under the facts, the way the alleged discrediting a witness, as they phrased it, would constitute witness intimidation.

"My recollection is we were careful not to give them a legal conclusion as to one of the elements that, yes, these facts indeed constitute witness intimidation because then we're doing their job for them and answering their factual question, which is what their job is."

The court concluded in the settled statement that "the record is settled and that there was no objection to the response to jury note number five."

3. The last three paragraphs beginning on page 39 of the opinion starting with the words "Counsel not only did not object" are amended to read as follows, and additional text is added to the opinion following the paragraphs:

Counsel not only did not object, he specifically agreed with the court's response. As a result, the claim is also forfeited under the doctrine of invited error. Defendants forfeited the claim by specifically agreeing at trial to the court's handling of the jury's question as the correct response and doing so for tactical reasons. (*People v. Sousa*

(2012) 54 Cal.4th 90, 114; *People v. Harris* (2008) 43 Cal.4th 1269, 1317.) Counsel feared that if the court answered the question by saying yes, the court would inform the jury as a matter of law that certain facts the jury found to show discrediting of a witness constituted witness intimidation.

Defendants contend that counsel rendered ineffective assistance by agreeing to the trial court's answer to the jury question because the jury was asking a legal question, and the correct response the court should have given was no, discrediting a witness does not constitute witness intimidation. To establish ineffective assistance of counsel, defendants must show both (1) deficient performance by trial counsel that fell below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability that they would have obtained a more favorable result but for counsel's alleged deficiencies. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674].)

Defendants cannot show that counsel's agreement with the trial court's answer fell below an objective standard of reasonableness. Because the court and counsel did not know what the jury meant by the misspelled term "discreteting" or the assumed term "discrediting" and did not know what facts the jury believed showed discrediting of a witness, they reasonably determined that answering the jury question yes or no risked thrusting the trial court into the jury's role of deliberating whether defendants had intimidated witnesses. CALCRIM No. 2622 defined witness intimidation as maliciously trying to prevent or discourage a witness from giving testimony. It was the jury's fact-finding function to determine whether a defendant's actions to discredit a witness or have a witness change his or her story under the circumstances amounted to a malicious attempt to prevent or discourage the witness from testifying.

Moreover, not instructing that discrediting witnesses did not constitute witness intimidation caused defendants no prejudice. CALCRIM No. 2662 gave the jury an accurate definition of witness intimidation. We presume, and have not been shown

otherwise, that the jury followed that instruction and did not rely on any facts to find defendants guilty of conspiracy to intimidate witnesses other than those that established defendants maliciously tried to prevent or discourage Rodriguez from attending or giving testimony at trial. Because the court correctly instructed on the crime, and because the court's answer to jury question No. 5 did not incorrectly instruct the jury and was not an abuse of discretion, counsel did not render ineffective assistance by not objecting to the court's answer to jury question No. five.

The modifications to the court's opinion do not affect the judgment. The petition for rehearing is denied.

BY THE COURT:			
HULL, Acting P.J.			
MAURO, J.	_		
RENNER, J.	_		

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMIAN LUIS FLORES et al.,

Defendants and Appellants.

C080799

(Super. Ct. No. 13F07733)

Defendants Hector Lorenzo Caballero and Damian Luis Flores appeal from their convictions of murder committed to benefit a gang, conspiracy to shoot at an inhabited dwelling, and conspiracy to intimidate a witness. They raise numerous claims of error: prejudice from remarks made by a judge before trial, gang expert testimony based on testimonial hearsay, admission of unduly prejudicial gang evidence, insufficiency of the evidence, instructional errors, improper answer to a jury question, and juror misconduct. They also ask us to remand for the trial court to exercise its recently-granted discretion to

strike firearm and serious felony prior conviction enhancements and to convene a hearing on their ability to pay fines and fees imposed on them.

We affirm the judgment.

FACTS AND PROCEEDINGS

The murder

On November 24, 2013, Caballero and Flores were at Flores's mother's home in Galt drinking beer with friends. The group included Hector Ojeda, Omar Melendrez, and Jose Rodriguez. Caballero and Flores belonged to the Varrio Ghost Town gang (VGT), a street gang affiliated with the Norteño street gang. Ojeda and Melendrez were also Norteños.

When the alcohol ran out, Ojeda drove Caballero, Flores, and Melendrez to a liquor store to buy more. On the way back to Flores's mother's home, Caballero told Ojeda to stop at Harvey Park. Harvey Park is in a predominantly Sureño neighborhood. Ojeda dropped the three off at the park, and then he began driving around the block.

Around that time, two men were separately returning to their apartments. Caballero, Flores, and Melendrez approached the first man and asked if he was a gang banger. He said he was not. The three then approached the second man and asked if he was Sureño or a gang member. He said no. They asked him if he knew any Sureños, and if he did, to tell them the park "belongs to us."

Angel Long and her boyfriend, the victim, were smoking in Long's car in front of the victim's house. They both noticed the group of three men walking toward the neighboring apartments, and then toward them. The victim told Long the three were looking for trouble. After Long and the victim got out of the car, the three approached them, yelling, "'What's up fool. What's your name? Where you from? What set you bang?'" Both the victim and Long said the victim did not bang. While Long kept saying

the victim doesn't bang, the victim pushed her away as Caballero drew a revolver and shot him three times.

The three men ran from the area. They ran toward Ojeda, who pulled his car over, and they jumped in. Flores and Melendrez told Ojeda that Caballero shot one of Jose Rodriguez's cousins. Flores nervously laughed as they talked about it. Caballero said he had asked the man something and the man replied, "'I'm not a bitch but I'll fight you.'" Caballero felt disrespected by the man's remark, so he shot him.

The group returned to Flores's mother's home. Caballero and Flores had numerous small blood stains on their sweatshirts. Both men took off their sweatshirts and put them in the washing machine. Caballero pulled a .22-caliber revolver out of his waistband and, carrying it in his hand, walked out to the backyard. He did not have the gun when he returned.

Ojeda drove Caballero and Flores to Flores's father's home. Flores told Ojeda that nothing would happen and not to say anything. Caballero told Ojeda not to be a snitch and not to say anything about that night.

Ojeda, who became a witness for the People, testified that gang members will resort to violence if they feel disrespected. They do this to make a name for themselves and for their gang.

The victim died from his injuries. Two .22 caliber bullets were recovered from his body. Another .22 caliber bullet was found at the crime scene. At trial, Long identified Caballero as the shooter.

The conspiracies

Caballero and Flores were arrested and housed at the Sacramento County Jail. Miguel Gollas, a Norteño for 18 years, was also in the jail after being arrested for a drug offense. Gollas met Caballero, who went by the nickname "Lencho," and the two talked about living in Galt. Gollas told Caballero he was dating the sister of Angel Ordaz, who

was also a Galt Norteño. Caballero told Gollas he was in jail because he shot a Sureño after an argument.

Gollas was trying to make bail. Vidal Fabela, an influential Norteño inmate who went by the name of Spider, asked if Gollas could do his "homey" a favor if he made bail and got out. Gollas agreed, and Fabella told him that someone would approach him. After Gollas's meeting with Spider, Caballero asked Gollas if he could pass a note to Ordaz when he was released. Gollas took the note.

Gollas read Caballero's note. He recalled at trial that the note was to send a message to those people who were "telling" and if possible, to shoot at their house and make it look like the Sureños shot the house to intimidate the witnesses.

Gollas told correctional officers he wanted to pass some information about a situation. The officers did not take the note. Instead, they moved him to a different cellblock. Gollas hid the note in his rectum. He was upset the officers did not take it.

In his new cellblock, Gollas met Flores. They talked about Flores's connection with Caballero and how the two got into a confrontation with a Sureño who was shot. Like Caballero, Flores asked Gollas to deliver a note to Ordaz. He gave the note to Gollas.

Gollas read Flores's note. The note was a message to those outside to get their stories straight against what Jose Rodriguez was saying, and it was an instruction to move the gun if they had not done so already. We will discuss the two notes in more detail below.

Gollas decided not to pass the notes to Ordaz. He did not want to be incarcerated, and he wanted to protect Ordaz, who was like a brother-in-law to him. He later met with detectives and gave them the notes.

Gang expert testimony

Sergeant Christie Lynn of the Sacramento County Sheriff's Department testified as an expert in Hispanic gangs. She relied on percipient witness testimony and police reports to opine that Caballero and Flores were active Norteño gang members. Relying on hypothetical facts that paralleled this case, she said the murder and the conspiracies to intimidate witnesses and shoot at houses would have been committed to benefit the gang. We will discuss Sergeant Lynn's testimony in more detail below.

Judgment

A jury found Caballero guilty of first-degree murder, conspiracy to shoot at an inhabited dwelling, and conspiracy to intimidate a witness by force or violence. (Pen. Code, §§ 187, subd. (a); 182, subd. (a)(1)/246; 182 subd. (a)(1)/136.1, subd. (c)(1) [statutory section references that follow are to the Penal Code unless otherwise stated].) The jury found true firearm enhancements and allegations that Caballero committed the crimes for the benefit of a criminal street gang. (§§ 12022.53, subds. (b)-(e)(1); 186.22, subd. (b)(1).) In a bifurcated bench trial, the trial court found that Caballero had incurred two prior strike convictions. (§§ 667, subds. (b)-(i); 1170.12.)

The court sentenced Caballero to a prison term of 145 years to life, calculated as follows: 75 years to life for first-degree murder (25 years to life tripled for the strike priors); a consecutive 25 years to life for the firearm enhancement; and a consecutive 45 years to life for conspiring to shoot at an inhabited dwelling (gang enhancement of 15 years to life tripled for the strike priors). The court imposed and stayed under section 654 a consecutive sentence of 25 years to life (third strike) for conspiring to intimidate a witness.

The jury found Flores guilty of second-degree murder and conspiracy to intimidate a witness by force or violence. (§§ 187, subd. (a); 182, subd. (a)(1)/136.1, subd. (c)(1).) It acquitted him of conspiracy to shoot at an inhabited dwelling. The jury found true a

firearm enhancement and the criminal street gang enhancement. (§§ 12022.53, subd. (e)(1); 186.22, subd. (b)(1).) The court in the bifurcated bench trial found that Flores had incurred a prior serious felony conviction which also qualified as a prior strike. (§§ 667, subds. (a), (b)-(i); 1170.12.)

The court sentenced Flores to a prison term of 74 years to life, calculated as follows: 30 years to life for second-degree murder (15 years to life doubled for the strike prior); a consecutive 25 years to life for the firearm enhancement; a consecutive 14 years to life for conspiring to intimidate a witness (gang enhancement of 7 years to life doubled for the strike prior); and a consecutive five years for the serious felony prior.

DISCUSSION

I

Judge's Improper Comments to Jury Panel

Defendants contend the trial court abused its discretion when it denied their motion to dismiss a jury panel whose members may have heard another trial judge make improper comments regarding the role of juries. They claim the court erred when it refused to investigate whether jurors were exposed to the comments and refused to allow counsel to question the potential jurors about the incident.

A. Background

Before voir dire began, counsel for Flores moved to dismiss a jury panel from an earlier court day. Although the record is somewhat unclear, it appears that on that earlier day, counsel was standing in the court hallway when he overheard Judge David Brown address the panel of jurors who had been called to his courtroom that morning. At that time, Judge Brown told the jurors that as a result of them appearing, the court will be able to settle cases. Defense attorneys will peek into the courtroom to see if the jurors are there, and then they will tell their clients to settle. Judge Brown also said that lawyers

wondered whether the jurors would believe their clients. By appearing, jurors do a great service "because now the attorneys can go settle and that's what the court—that helps the court process."

Counsel had to appear in this case, so he asked another attorney not involved in this case to continue listening to Judge Brown. That attorney reported that Judge Brown's comments were to the effect that "attorneys are looking into this room to see that you are here. Their cases will resolve because they now know that you are here. You are a very important part of our system because of that. [¶] And number two, that attorneys will want you to believe what their clients have testified to or the evidence that is presented."

It is also unclear whether any of the potential jurors who heard Judge Brown's comments eventually ended up on the panel of jurors called for this trial.

In any event, counsel argued that Judge Brown's comments tainted the panel. He asserted the comments shifted the burden of proof by implying that jurors should not believe defendants and their evidence, and that defense attorneys believe their clients are guilty and should settle if jurors appear. Caballero joined Flores's motion to dismiss the panel.

The trial court denied the motion. It stated the panel members would be vetted in voir dire, and that process would allow them ample opportunity to state whether something they heard affected their ability to be fair. The court would not allow questions about the incident to avoid bringing any more attention to it. The court would allow questions about the panel members' feelings about attorneys or if they had heard or seen anything in the past that would affect their ability to be fair. It would ask the members if anything had happened recently or in the past that affected how they thought about attorneys, the courts, and the criminal justice system. The court believed these questions would reveal any potential prejudice based on the incident.

After ruling on the motion, the trial court addressed the prospective jurors. It stated the defendants were presumed innocent and the People had to prove each element of a crime and special allegation beyond a reasonable doubt. Jurors had to consider the evidence impartially and apply the law as instructed. They had to be fair and impartial to both sides in judging the facts.

Turning to voir dire, the court told the potential jurors they were to answer all questions truthfully and completely. The court also asked the prospective jurors in the audience to listen to the questions because if they entered the box, it would ask them if they had any pertinent information for those questions.

Among its questions to the panel, the court asked, "[D]o any of you have any belief or feeling toward any of the parties, the attorneys, or the witnesses that would make it impossible or difficult for you to act fairly and impartially both as to the defendants and the People in this case?" No prospective jurors indicated they did. The court asked if the potential jurors had any strong feelings about the criminal justice system that would make it difficult for them to be fair and impartial. None did.

The court further asked, "[H]as anything ever happened in your life, either recently or in the past, that has affected how you think about attorneys, whether they are prosecutors, defense attorneys, civil attorneys, the courts, or the criminal justice system in general? Any strong feelings that would affect your ability to be a fair and impartial juror?" No prospective juror responded.

Flores's attorney also questioned the prospective jurors about bias against attorneys. He stated:

"There's also a bias against people like me not because [of my race] but because I'm a defense lawyer. When you watch TV, movies, all of those things, they depict us as evil characters. Characters who are willing to do anything to get their clients off. That we're in the backroom with a caldron and we're looking for a piece of hair that you dropped so we could put it in the pot and then all of a sudden you get into an auto

accident. All this kind of stuff. All right, I'm exaggerating a little bit but you know and I know we're not depicted as the world['s] best human beings.

"So and all I want to know is if you have a bias against defense lawyers. Like if you sit around all the time going all those lazy defense lawyers, look at what they are doing, see, that's a bias. If that's the way you feel about defense lawyers, let it out and let me know by raising your hands. It's okay. All right, no hands are raised. Okay."

As jury selection continued and the parties used their peremptory challenges, the trial court regularly asked the prospective jurors entering the box if they had any relevant information regarding the previous questions from the court or the attorneys. No prospective juror indicated any bias or problem with defense attorneys or that he or she could not follow the law as instructed.

B. Analysis

Defendants contend the trial court abused its discretion by not investigating the effect of Judge Brown's comments. They argue Judge Brown committed misconduct by instructing the jury panel as he did, and the trial court should have examined the potential jurors to determine whether they had heard the judge's comments and how those comments affected their view of defendants and defense counsel. They assert the court's general questions were inadequate. They also argue that by limiting voir dire, the court prevented defense counsel from examining any additional witnesses.

"'[T]he conduct of voir dire is an art, not a science,' so '"[t]here is no single way to *voir dire* a juror." '(*People v. Taylor* [(1992) 5 Cal.App.4th 1299,] 1313, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 451 [114 L.Ed.2d 493] (dis. opn. of Kennedy, J.).)

"'The Constitution . . . does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.' (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 [119 L.Ed.2d 492], quoted in *People v. Box* [(2000)] 23 Cal.4th [1153,] 1179

[disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10].) The high court has 'stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias.' (*Mu'Min v. Virginia, supra*, 500 U.S. at p. 427 [trial court is not required to ask content-based questions regarding pretrial publicity]; see also *People v. Taylor, supra*, 5 Cal.App.4th at p. 1313.) Accordingly, 'the trial court retains great latitude in deciding what questions should be asked on *voir dire*,' and '"content" questions,' even ones that might be helpful, are not constitutionally required. (*Mu'Min v. Virginia, supra*, at pp. 424, 425.) To be an abuse of discretion, the trial court's failure to ask questions 'must render the defendant's trial fundamentally unfair.' (*Id.* at pp. 425-426.) 'Such discretion is abused "if the questioning is not reasonably sufficient to test the jury for bias or partiality." '(*People v. Box, supra*, at p. 1179.)" (*People v. Cleveland* (2004) 32 Cal.4th 704, 737.)

Here, the trial court's questioning was reasonably sufficient to test the potential jurors for bias. The court asked if any of the potential jurors had feelings toward the parties, counsel, or the justice system that would make it difficult to act fairly and impartially. It asked whether anything had happened recently or in the past that affected how they thought about attorneys, including defense attorneys, the courts, or the criminal justice system. No one responded affirmatively to these questions. Even Flores's counsel asked whether the potential jurors had a bias against defense lawyers, and none of the jurors responded affirmatively. Had the potential juror's feelings about defendants, defense counsel, or the justice system been affected by Judge Brown's comments, it was reasonable for the court to believe that the jurors would have raised those concerns in response to these questions.

Defendants claim the trial court should have asked whether any of the potential jurors had been present in Judge Brown's courtroom when he made his comments and then questioned those people separately. This assertion is not cognizable on appeal

because defendants did not ask the trial court to take this action. (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 736.) Regardless, it was reasonable for the court to proceed as it did so as not to highlight Judge Brown's comments.

Defendants rely on *People v. Carmichael* (1926) 198 Cal. 534 (*Carmichael*) [overruled on another ground in *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086], as authority for concluding the court's questions to the jury were too general and thus an abuse of discretion. *Carmichael* is distinguishable. In that case, the California Supreme Court held that the trial court erred in preventing defense counsel from questioning prospective jurors about whether they knew defendant's prior jury had hung by a vote of 10 to two for guilty. The high court ruled that counsel's proposed questions were proper, as the jurors' answers would tend to show the existence or nonexistence of actual bias. (*Carmichael, supra*, 198 Cal. at pp. 542-543.)

The *Carmichael* court also held that the error was not cured by general questioning or asking whether the potential jurors had talked with jurors or witnesses in the former trial. (*Carmichael, supra*, 198 Cal. at pp. 544-545.) The court stated, "The asking of a general question of a juror does not always direct his attention to all the elements which go to make up the subject matter of the question." (*Id.* at p. 545.)

In contrast with *Carmichael*, the specific questions that the trial court and defense counsel here asked the potential jurors directed the jurors to the issue of concern, and they did so without exposing them to Judge Brown's potentially prejudicial remarks. Going beyond general questions of bias, the court asked if the jurors had heard anything recently or in the past that affected how they thought about defense attorneys or the criminal justice system. Counsel directly asked if the jurors were biased against defense attorneys. Balancing its questions to expose bias without creating it, the trial court did not abuse its discretion by investigating the potential for bias from Judge Brown's remarks with the questions it asked or with the limitations it placed on voir dire.

Evidentiary Issues

Defendants raise several arguments challenging the admission and sufficiency of evidence. They assert (1) the court erred by admitting gang expert testimony that consisted of testimonial hearsay; (2) the admission of the gang-related evidence was unduly prejudicial and violated due process; (3) insufficient evidence supports Caballero's conviction of conspiracy to shoot at a residential dwelling; and (4) insufficient evidence supports Flores's conviction of conspiracy to intimidate a witness by force.

A. Admission of Gang Expert's Testimony

Caballero and Flores contend the trial court erred by admitting testimonial hearsay evidence from Sergeant Lynn, the prosecution's expert witness on gangs, in violation of state hearsay law and the Sixth Amendment right of confrontation. Defendants claim the error was prejudicial and requires us to vacate the gang enhancements and reverse the judgments.

We agree that some of Sergeant Lynn's testimony was testimonial hearsay that violated *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), but much of it was not. Any error in admitting the evidence was harmless, as ample nonhearsay evidence from percipient witnesses and Sergeant Lynn established defendants' gang affiliations and motives beyond a reasonable doubt.

1. Background

The Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.) authorizes additional punishment for criminal street gang members who commit gangrelated felonies. For this enhancement, the prosecution must show that the defendant committed a felony "for the benefit of, at the direction of, or in association with any

criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" (§ 186.22, subd. (b)(1).)

Under the statute, a criminal street gang is an ongoing association or group of three or more persons that has as a primary activity the commission of serious felonies listed in the statute. (§ 186.22, subd. (f).) The group also has a common name or common identifying sign or symbol, and its members individually or collectively engage in a "pattern of criminal gang activity." (*Ibid.*) A pattern of criminal gang activity is the commission or conviction of two or more of the listed felonies on separate occasions within a period of three years or by two or more persons. (§ 186.22, subd. (e).)

To establish this enhancement here, the prosecution introduced evidence from percipient witnesses and Sergeant Lynn to show that defendants were members of the VGT, VGT was a Norteño criminal street gang as defined by the statute, and defendants committed their crimes for the gang's benefit to promote criminal conduct by gang members.

Defendants' acquaintances testified to defendants' gang membership and contacts. As mentioned above, Hector Ojeda testified that Caballero and Flores were members of VGT, and VGT was affiliated with the Norteño street gang. Miguel Gollas learned that Caballero was Spider's gang homie. Michael Aldridge, who associated with Norteño gang members in Galt, knew that Flores was a VGT gang member.

Jose Rodriguez, who was with defendants at Flores's mother's home the night of the murder and was the victim's cousin, testified that Flores was a VGT gang member. Rodriguez also stated that when he hung out with Norteños, Caballero would sometimes be there.

Christina Holguin, who dated Caballero before the murder, knew that Caballero had been affiliated with Norteños. They were together the day after the murder when Caballero told Holguin that the SWAT team was at his house. He felt he was going to be arrested for his gang affiliation and tattoos and for the murder.

Priscilla Azua, Caballero's mother, testified that she knew Caballero was a Norteño gang member.

Arresting and investigating officers testified as percipient witnesses to gangrelated contacts they had with defendants. As to Caballero, officers testified as percipient witnesses to the following:

- In January 2008, Caballero was in a fight with some Sureños and chased them with a tire iron. He said he "kicks it" with Norteños and had been jumped into a gang a year earlier.
- In April 2008, Caballero was riding a bicycle while carrying a large baseball bat. The bat's handle was wrapped in electrical tape and "VGT" was written on the bat.
- In March 2009, officers detained Caballero who, along with his companions, had silver spray paint on their fingertips. Officers found graffiti on several homes, cars, and fences in the same color of paint. The graffiti was "XIV" and "VGT."
- In June 2009, Caballero, then a resident at a county boys' ranch, approached a resident while making gang statements and attacked the resident. While restrained, Caballero yelled "that's the Norte way" and "On Norte." "On Norte" meant his actions were done for his gang.
- In May 2010, Caballero participated in a fight at the county juvenile hall between groups of Norteños and Sureños.
- In January 2011, while in juvenile hall, Caballero told a resident that he was teaching the other Norteños in the unit the gang's structure and discipline, and that he wanted to be incarcerated until the age of 25 so he could take what he learned in prison back to the streets to teach the "little homies."

As to Flores, officers testified as percipient witnesses to the following:

• In August 2005, officers detained Flores and a Norteño on a call of shots fired. Flores's companion said it was a gang-on-gang incident.

- In April 2006, officers detained Flores who was possessing a knife. He admitted being a Norteño to the officers. He had one dot tattooed on his right forearm and four dots tattooed on his left forearm representing the number 14, a symbol commonly associated with Norteños in Galt.
- In September 2006, an officer initiated a traffic stop of a car in which Flores, known by the officer to be a VGT Norteño, was with two other Norteños.
- In October 2007, Flores and others went out to look for Sureños to confront. Flores shot two men. He bragged to his friends that he shot two Sureños. Flores was convicted of two counts of attempted murder and served six years in prison.

In her testimony, Sergeant Lynn explained the characteristics of the Norteño gang and its subset, the VGT. Their common signs and symbols include the color red and the number 14 on clothes and tattoos. 14 is a gang symbol because the letter "n" is the 14th letter in the alphabet. Sureños are the Norteños common enemy. VGT's criminal activities include attempted murder and assault with deadly weapons. Reviewing photos of defendants, Sergeant Lynn explained that their various tattoos indicated membership in VGT and the Norteño gang.

Sergeant Lynn also testified about two predicate crimes to establish that VGT qualified as a criminal street gang. She testified about these crimes based on her review of police reports. No percipient witness testified concerning these crimes. One crime concerned Diego Viona, a VGT Norteño. Viona was convicted of assault with a deadly weapon. He and others confronted the victim in 2010 and stabbed him multiple times. The gang enhancement was found true.

The second predicate crime concerned Joel Anaya, also a VGT Norteño. Anaya was convicted of attempted murder for shooting at two Sureños in Harvey Park in 2011. The gang enhancement was found true.

Sergeant Lynn testified of the gang-related contacts with defendants by police which the percipient witnesses had described. She discussed these events based on the police reports filed on each.

She also testified of gang-related incidents involving defendants about which percipient witnesses did not testify. These incidents included: (1) a March 2007 police report describing how responding officers found Flores and other Norteños participating in a gang fight; (2) an April 2007 police report noting that Flores was found in the presence of Norteño members; (3) May and August 2007 police reports describing how Flores was stopped in a vehicle with other Norteños; (4) a June 2007 police report depicting how Flores was in the presence of a Norteño following a report of vandalism; and (5) an October 2007 police report describing how Caballero was contacted in a vehicle with fellow Norteños.

Based on the evidence she considered and her own experience, Sergeant Lynn concluded that defendants were members of VGT.

She also opined, based on hypothetical facts that mirrored this case, that defendants committed the crimes to benefit VGT and the Norteños. Norteños who go into a Sureño neighborhood asking people where they are from and if they bang are looking for a challenge. To them, a wrong answer means the person is aligning himself or herself with the wrong gang and is being disrespectful. The gang members will respond with threats or violence. By being in the Sureño neighborhood, the Norteños were disrespecting the Sureños and showing they could go into the enemy's claimed territory and do whatever they wanted. Pulling out a gun and murdering a person who disrespected them would benefit the gang by gaining respect from their enemies and showing they were not afraid to take violence into enemy territory.

Similarly, sending notes from jail to threaten witnesses benefited the gang by instilling fear and making sure no one told a story that the defendants did not want told. Gang members facing charges will often attempt to intimidate witnesses to protect the

gang member as well as the gang. Both hypotheticals, murder of a disrespectful citizen and passing notes to intimidate witnesses, would, in Sergeant Lynn's opinion, benefit the gang as a whole.

2. Analysis

Defendants assert that Sergeant Lynn's case-specific factual testimony, including her description of the two predicate crimes, was beyond her personal knowledge, was testimonial hearsay, and was thus inadmissible. They also contend the error was prejudicial.

The hearsay rule does not bar an expert witness's testimony concerning her general knowledge in her field of expertise, even if technically hearsay. (*Sanchez, supra*, 63 Cal.4th at p. 676.) Gang experts may provide background testimony "about general gang behavior or descriptions of the . . . gang's conduct and its territory" and the gang's "history and general operations" when based on well-recognized sources in the expert's area of expertise. (*Id.* at p. 698.)

By contrast, an expert is "precluded from relating *case-specific* facts about which the expert has no independent knowledge." (*Sanchez, supra*, 63 Cal.4th at p. 676, original italics.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686, original italics, fn. omitted.)

Case-specific facts "are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish

the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Sanchez, supra*, 63 Cal.4th at p. 676.)

Here, most of the gang-related testimony on which Sergeant Lynn relied was percipient witness testimony. Officers testified to six different gang-related events involving Caballero and four events involving Flores in which they had personal knowledge. Sergeant Lynn relied upon this testimony as well as the corresponding police reports to conclude that defendants were members of the VGT gang. Admitting her opinion based on percipient witness testimony did not violate hearsay rules or the confrontation clause, as she could give an opinion about what those facts meant. (Evid. Code, § 1220; *Sanchez, supra*, 63 Cal.4th at p. 676.)

Contrary to defendants' arguments, Sergeant Lynn's testimony regarding the two predicate crimes was also admissible. Evidence of predicate crimes not involving the defendants before us is not case-specific for purposes of *Sanchez* and can be admitted through the expert witness's testimony. (*People v. Blessett* (2018) 22 Cal.App.5th 903, 943-945, review granted Aug. 8, 2018, S249250; but see *People v. Ochoa* (2017) 7 Cal.App.5th 575, 582-583.)

Sanchez "defines case-specific facts to be facts 'relating to the particular events and participants alleged to have been involved in the case being tried.' ([Sanchez, supra, 63 Cal.4th] at p. 676.) The predicate offenses used in this case do not fall within this definition; they did not involve the particular events or participants involved in the case being tried. Rather, they are historical facts related to the gang's conduct and activities. These facts pertain to the gang as an organization and are not specific to the case being tried. They establish that the 'organization, association, or group' has engaged in a

'pattern of criminal gang activity' and is thus a criminal street gang (§ 186.22, subd. (f)) irrespective of the events and participants in the case being tried. A predicate offense and the underlying events are essentially a chapter in the gang's biography. Thus, they are relevant to a gang expert's opinion about whether a group has engaged in a pattern of criminal gang activity and is a criminal street gang under the statutory definition.

Moreover, predicate offenses are specific examples of the gang's primary activities and thus such evidence is relevant to the gang expert's opinion about the primary activities of the gang." (*People v. Blessett, supra*, 22 Cal.App.5th at pp. 944-945, original italics.)

Because the predicate offenses evidence did not concern case-specific facts, the trial court correctly admitted Sergeant Lynn's testimony concerning the predicate crimes.

Sergeant Lynn, however, also relied on police reports of gang-related incidents involving defendants that were not introduced by percipient witnesses. Four of these incidents concerned Flores and one concerned Caballero. An expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra*, 63 Cal.4th at p. 686.) Moreover, police reports such as those Sergeant Lynn relied on are testimonial where they "relate hearsay information gathered during an official investigation of a completed crime." (*Id.* at p. 694.) Admitting these case-specific statements from the police reports violated defendants' right of confrontation and state hearsay rules.

At issue, then, is whether the court's admission of Sergeant Lynn's testimony based in part on testimonial hearsay was prejudicial. We review violations of the confrontation clause for prejudice under the harmless error standard of *Chapman v*. *California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] (*Chapman*). (*People v. Capistrano* (2014) 59 Cal.4th 830, 873, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104.) We ask if it is clear beyond a reasonable doubt that a rational jury

would have reached the same verdict absent the error. (*People v. Capistrano, supra*, 59 Cal.4th at p. 873.)

The error in this case was harmless beyond a reasonable doubt. Without the disputed evidence, the jury still would have found the defendants guilty of the charged crimes, they were members of VGT, and they committed the crimes for the gang's benefit and with the intent to promote criminal conduct by gang members.

The record is replete with admissible evidence establishing that defendants were members of VGT. Other Norteño gang members, acquaintances, and family members testified without contradiction that defendants belonged to VGT and associated with other Norteños. Both defendants had numerous VGT and Norteño tattoos.

As already described, percipient police testimony showed that both defendants participated in gang-related activities. Caballero fought Sureños, spray-painted Norteño symbols on property, attacked a boy's ranch resident while declaring "the Norte Way," taught Norteño organization and discipline at the boy's ranch, and participated in a fight between Norteños and Sureños in juvenile hall. Flores was present at a gang-on-gang shooting, he fired shots at a known Sureño residence looking for Sureños to confront, possessed a knife while admitting to being a Norteño, and was present with two other Norteños during a vehicle stop.

The admissible evidence also established that defendants committed the crimes for the benefit of, or in association with the gang to promote criminal conduct by gang members. Ojeda testified that gang members will resort to violence if they feel disrespected to make a name for themselves and for their gang. That is what occurred here. A group of VGT Norteños entered a Sureño neighborhood looking for a Sureño to confront. After asking others if they were gang members, they confronted the victim. The victim responded in a way that Caballero felt was disrespectful, and Caballero shot him multiple times. After their arrests, they relied on other Norteño members inside and outside of jail to prevent others from testifying against them, and they directed those

members to use violence if necessary. The uncontradicted percipient testimony, along with Sergeant Lynn's expert opinion, showed that the crimes promoted further criminal conduct by VGT members by increasing their reputation and community members' fear and by protecting the gang's members.

We have no reasonable doubt that a rational jury would have returned the same verdicts had the testimonial hearsay evidence been excluded. Any error in not excluding that evidence was harmless.

B. Prejudicial Nature of Evidence of Flores's Gang Activities

Flores raises an additional ground for challenging the admission of the police and expert witness testimony regarding his prior gang activities: the evidence was unduly prejudicial under Evidence Code section 352. Denying an in limine motion by Flores, the trial court ruled the gang evidence was admissible and not unduly prejudicial under Evidence Code section 352. The court admitted the evidence for the limited purposes of showing motive and intent and for establishing the gang enhancement. The evidence could not be used as disposition or bad character evidence.

Flores contends the trial court abused its discretion, as the gang evidence was prejudicially cumulative, was improper bad character evidence admitted in violation of his due process rights, and was inadmissible to establish motive.

We find no basis to reverse the trial court's ruling.

Evidence Code section 352 authorizes a trial court in its discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) A court's ruling under Evidence Code section 352 " "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary,

capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" ' " (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.)

"'The prejudice that [Evidence Code] section 352 "'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)" (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

Gang evidence can be prejudicial, but its probative value often outweighs its prejudicial effect. "Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts—such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)" (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

"In cases *not* involving the gang enhancement, . . . evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus

operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050, original italics.)

Flores contends the evidence was prejudicial because it was cumulative, it consisted of propensity evidence, and it was inadmissible to establish motive. As to the first argument, Flores asserts that because the prosecution introduced more gang evidence than was necessary to establish the gang enhancement, the evidence became prejudicially cumulative. He claims the enhancement could have been proven by expert testimony alone regarding his tattoos and admissions to police of his gang membership, rendering evidence of his numerous other police contacts, associations with gang members, and prior offenses duplicative.

We disagree with this argument. "The prosecution need not sap the force of its case by presenting only the most antiseptic evidence, even in the face of a defense offer to stipulate. [Citations.] A fortiori, where, as here, the prosecution must convince the fact finder, beyond reasonable doubt, of charges and allegations the defendant has not conceded, it need not sanitize its case by presenting only enough evidence to meet bare legal sufficiency." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1138, disapproved on another ground by *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

We recognize "the state has a strong interest in prompt and efficient trials, and that interest permits the nonarbitrary exclusion of evidence, including 'when the presentation of the evidence will "necessitate undue consumption of time." '[Citation.] Accordingly, neither the prosecution nor the defendant has a right to present cumulative evidence that creates a substantial danger of undue prejudice [citation] or that unduly consumes the court's time [citation]." (*People v. Williams* (2009) 170 Cal.App.4th 587, 611.)

"[N]o bright-line rules exist for determining when evidence is cumulative"

(People v. Williams, supra, 170 Cal.App.4th at p. 611.) The term "has a substantive meaning, and the application of the term must be reasonable and practical." (Ibid.) "The plain meaning of cumulative as 'repetitive' or 'additional' [citations] obviously implies in this context that other evidence on the point at issue has already been introduced. . . . [¶] . . . To be cumulative imports that something of like effect is already shown." (People v. Filson (1994) 22 Cal.App.4th 1841, 1850, disapproved on another ground in People v. Martinez (1995) 11 Cal.4th 434, 452.) However, "[e]vidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value." (People v. Mattson (1990) 50 Cal.3d 826, 871.)

The trial court did not abuse its discretion in concluding the gang evidence was not cumulative. The evidence was relevant to establishing the gang enhancement, and thus its prejudicial impact could not outweigh its probative value. The prosecution could also rely on the evidence in addition to Flores's tattoos and prior admissions because the evidence carried greater probative value than those matters. It demonstrated that Flores's loyalty to the gang was longstanding and so strong he would commit violent acts on its behalf.

Moreover, *Sanchez* required the prosecution to introduce percipient witness testimony to prove the gang enhancement. Relying on an expert witness to make that showing would have been more efficient, but, as already mentioned, the law now forbids the admission of testimonial hearsay by experts to prove the point. *Sanchez* requires prosecutors to introduce more evidence, which will occupy more of the court's time.

In this case, the gang-related testimony did not prejudicially consume the court's time. The percipient witnesses' testimony is recorded in only 30 pages of transcript and is limited in its scope. The expert witness's testimony on the predicate crimes and the other incidents on which she relied also took only minimal time. Under these

circumstances, we cannot say the trial court abused its discretion by admitting the evidence over an objection that it was cumulative.

Flores next contends the gang evidence was propensity evidence admitted in violation of his due process rights. He argues the evidence of police contacts was unduly prejudicial because it suggested Flores had a bad character, and the evidence could lead to the jury punishing him for uncharged criminal acts.

We disagree with these arguments, too. Admitting criminal propensity evidence where not allowed by statute does violate due process, but the police testimony was expressly not admitted as character evidence. The trial court admitted it only for the limited purpose of establishing motive and intent under Evidence Code section 1101, subdivision (b), and for establishing the gang enhancement. The "routine application of state evidentiary law does not implicate defendant's constitutional rights." (*People v. Brown* (2003) 31 Cal.4th 518, 545, fn. omitted.) The trial court also limited the use of the evidence, instructing the jurors they "could not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." (CALCRIM No. 1403.) We presume the jury followed this instruction, and no evidence suggests otherwise. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

Flores, however, claims the evidence was not admissible to show intent or motive. The trial court did not abuse its discretion by admitting the gang evidence to establish motive. Flores's gang activity, including his prior shooting of Sureños, was relevant and sufficiently like the present crime to establish that his and Caballero's motives in this shooting were to benefit their gang. The probative value of that evidence outweighed whatever emotional bias the evidence may have engendered in the jurors. The court did not err in admitting the evidence.

C. Sufficiency of the Evidence of Conspiracy to Shoot at a Dwelling

Caballero contends insufficient evidence supports his conviction of conspiracy to shoot at an inhabited dwelling. He argues the information charged him with conspiring to shoot at Jose Rodriguez's house as one of the overt acts of the conspiracy, but the note on which the prosecution relied to prove this crime directed people to shoot at someone else's house, not Rodriguez's. We conclude substantial evidence supports the verdict.

1. Background

The information alleged that one of Caballero's overt acts of conspiracy was giving Gollas the note which "in summary, stated that an anonymous person needed to deliver a 'message' to witness Jose Rodriguez' house, shooting it."

Gollas testified about the note. He said, "I was in my cell bored so it said just—not word by word but in regards to send a message out to those people. They are saying—they are telling. And if possible shoot at the house and make it seem like it was Southsiders obtaining to shoot the house to intimidate the witness."

Gollas read the note to the jury, and the note was introduced into evidence.

Caballero states in his opening brief that "that kid" referenced in the note is Rodriguez.

The underlines were written by Caballero; they do not indicate missing text. The note reads in full:

"I'm writing this at the last minute so real quick straight to it. People present that night need to step up and start telling the truth. And that is that that kid is a liar and is just making shit[.] Everyone was drinking that night feel and I left early around 8:00 clock you know what I mean so that needs to be said and Damian never left his house ___.

"Next you know Lil Hec [Little Hector] is now trash so fuck him[.] As far as I know he aint lieing [sic] and tryna [sic] to make shit up trying to implicate. But he might start so if it is possible and only if he starts talking he needs to be warned that. That is not in his familys [sic] best interest __ Something will need to be done to make sure he

stays quiet ___ Maybe a message to his house by an annoynomous [sic] person shooting it. Scrap tags etc. Imagination will be needed so it cannot be traced to homies or us.

"Speak with my dad about this and only those you feel you can trust to do the right thing feel me that kids [sic] a liar who's to be recognized as one[.] At the least the people there that night dont [sic] recall to [sic] well because they were drunk and that individual was the one most drunk feel me.

"But people must not go overboard with what they say you know they can't get caught up in lie's[.] Also __ Ernie made a statement to police I have not seen a copy of it yet so this person must be treated accordingly until further notice.

"And Damian's niece Bianca pretty much told on us. Matching a police description [and] lieing [sic] and saying we were wearing clothes we werent [sic]. She's just tryna [sic] save her man piece of shit.

"Please handle delicately and let my dad know when this reaches you."

As Gollas read the note to the jury at trial, the prosecutor sought to establish the identify of "this other Hector[.]" Defense counsel objected, and the court sustained the objection. The identify of Little Hector was not established at trial. At the time of the shooting, Jose Rodriguez was a VGT Norteño and went by the name of "Silent."

Asked in relation to Flores's note what it meant to send a message to the witnesses to change their statements, Gollas said, "Pretty much do whatever it takes to get them [defendants] out of the situation. I mean, pretty much whatever it takes."

Sergeant Lynn, the gang expert witness, testified concerning the concept of snitches in Hispanic gang culture. Essentially, gang members do not snitch. By snitching, a member was turning on his life and his gang family. A member who snitches was putting himself in harm's way and should expect "a beatdown or . . . some other" assault in retaliation.

Convicting Caballero of conspiracy to shoot at an inhabited dwelling, the jury found that, as an overt act of the conspiracy, Caballero gave Gollas a note "which, in summary, stated that an anonymous person needed to deliver a 'message' to witness Jose Rodriguez's house, shooting it[.]"

2. Analysis

"To assess the evidence's sufficiency, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" 'the jury's verdict. [Citation.]" (People v. Zamudio (2008) 43 Cal.4th 327, 357.)

"'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.' (*People v. Morante* (1999) 20 Cal.4th 403, 416, quoting Pen. Code, § 184.) 'Criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy.' (*Morante*, at p. 416.) Other than the

agreement, the only act required is an overt act by *any* of the conspirators, not necessarily the defendant, and that overt act need not itself be criminal. (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.)" (*People v. Smith* (2014) 60 Cal.4th 603, 616, original italics.)

Here, the information specifically alleged that one of the overt acts was Caballero's directive in his note to deliver a message to "Jose Rodriguez's house, shooting it[.]" A rational jury could interpret the note to direct, or not to direct, someone to shoot at Rodriguez's home. The note can be read to suggest that someone shoot at Little Hector's house if he starts talking and to keep him quiet. There is no evidence in the record suggesting Rodriguez was Little Hector.

However, a rational juror could also interpret the note to suggest shooting at Rodriguez's home. After Caballero suggested shooting at the house, he asked the recipient to "[s]peak with my dad about this and only those you feel you can trust to do the right thing feel me that kids [sic] a liar who's to be recognized as one[.]" In light of Sergeant Lynn's expert testimony that gang members will retaliate against snitches, the jurors reasonably could have inferred that Caballero's directive to speak with his father about shooting at the house and doing "the right thing" to recognize Rodriguez as a liar was a directive to shoot at Rodriguez's house.

Gollas's testimony strengthened this interpretation. He remembered the note as directing its readers to send a message to those who are telling and, if possible, shoot at the house to intimidate the witness. He said a direction to send a message to witnesses to change their statements meant the readers were to do whatever it took to get the defendants out of trouble. The jurors, understanding a gang's likely retribution against snitches and Caballero's directive to do whatever it takes to free the defendants, including doing "the right thing" against Rodriguez, could have reasonably interpreted the note to direct the readers to shoot at Rodriguez's home. Substantial evidence supports that interpretation and Caballero's conviction.

D. Sufficiency of the Evidence of Conspiracy to Intimidate a Witness

Flores contends insufficient evidence supports his conviction of conspiracy to intimidate a witness by force or violence. He claims the evidence does not show that anyone agreed with him to intimidate witnesses, nor does the evidence show that the conspiracy was to prevent or dissuade a witness from testifying, as prohibited by section 136.1. At most, it shows he attempted to influence witnesses, a misdemeanor under section 137.

1. Background

The information alleged that Caballero and Flores conspired with each other and with other persons to intimidate a witness by force or violence, actions prohibited by section 136.1, subdivision (c)(1). The information alleged the conspiracy's overt acts were the following:

- 1. Vidal Fabela (Spider) told Gollas that Gollas needed to do a favor and would be approached later with instructions;
- 2. Caballero gave Gollas a note which directed someone to deliver a message to Rodriguez's house, shooting it; and
- 3. Flores gave Gollas a note which further detailed steps to be taken to intimidate Rodriguez.

The evidence supported the first two alleged overt acts. As to the third, the note Flores gave to Gollas read in relevant part:

"Get at Lorenzo 'Smiley' as well as yourself to get at all the lil [sic] homies to let them know that night I did not leave the house and talk to Big Hector 'silent' to ask what Lencho [Caballero] wants them to tell the investigators[.] We need them to make it seem like the fool who is telling 'Jose Rodriguez' is lying and he was drunk and wasn't in his right mind because his statement . . . is the one that's kind of strong. If the homies all say

the same story it proves that the snitch 'Jose Rodriguez' is lying. And my bro nos were [sic] that thing is at 'gun'; to get it out of there already if they haven't."

2. Analysis

To prove that Flores conspired to violate section 136.1, the prosecution had to show that Flores agreed with someone to prevent or dissuade or attempt to prevent or dissuade Rodriguez from testifying using force, a threat of force, or violence. (§ 136.1, subd. (c)(1).) Flores contends there is insufficient evidence to establish that he entered into an agreement to intimidate, or that his note intended to instigate witness intimidation as opposed to merely influencing a witness.

We turn first to the issue of agreement. "Evidence is sufficient to prove a conspiracy to commit a crime 'if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.)

The parties "need not *expressly* agree at all: 'To prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, "a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish *the act* and unlawful design." [Citation.]' [Citation.]" (*People v. Johnson* (2013) 57 Cal.4th 250, 264, original italics.)

By itself, Flores's note does not indicate he and another person agreed to intimidate witnesses by force. We disagree with the Attorney General's assertion that Flores's note instructed Norteños on the street to intimidate Rodriguez. Nothing in Flores's note expressly attempts, or encourages others to attempt, to prevent or dissuade a witness from testifying—by force or otherwise. Rather, it recognizes that gang members

will talk with investigators, and it directs them on what they should say. It does not tell them to use force to prevent Rodriguez from testifying.

The Attorney General argues a reasonable juror could interpret Flores's note as an attempt to prevent Rodriguez from testifying. The Attorney General claims Flores was trying to show Rodriguez that he and Caballero had numerous Norteños ready to contradict Rodriguez's statements. The jury could view this as an intimidation tactic to scare Rodriguez from testifying. Made in the gang context where a snitch is subject to retaliation, the note, the Attorney General argues, could be viewed as an implicit threat to Rodriguez that testifying would put him in danger.

This is too tenuous a link from which the jurors could infer an agreement to intimidate Rodriguez by force against testifying. Instructing witnesses on how to testify against Rodriguez is not an act of force against Rodriguez. The crime of intimidating a witness under section 136.1, subdivision (c)(1), requires proof that the defendant specifically intended to dissuade a witness from testifying by force or violence. (See *People v. Young* (2005) 34 Cal.4th 1149, 1210.) A directive to gang members on *how to testify to contradict* Rodriguez's testimony, even in the context of gang culture's history of retaliating against snitches, does not establish that Flores had the specific intent to direct others to intimidate Rodriguez by force or violence.

Expanding beyond the language of the note, the Attorney General argues the jury could reasonably infer under all the circumstances that Flores agreed with Caballero to intimidate Rodriguez by force. The Attorney General states, "Considering Flores's and Caballero's criminal association with each other, their aligned interests, the similarity of their notes, the use of the same middleman, the use of the same intended recipient, and their history of covering up the crime together, the jury could reasonably infer they tacitly agreed to intimidate Rodriguez."

On this point, we agree with the Attorney General. Caballero and Flores belonged to the same gang, committed the murder together, and covered it up together. Fellow

Norteño Gollas spoke with Flores about his getting to know Caballero and the murder Flores and Caballero committed. Learning that Caballero gave Gollas a note to take to the outside, Flores, it is reasonable to assume, gained an understanding from Gollas of the note's content. Supporting Caballero's message, Flores drafted his own note and directed the gang members to learn from Caballero what he wanted them to say. Flores gave his note to Gollas with the direction to deliver the note to the same person who would receive Caballero's note. The jury could reasonably find that Flores desired to present a unified message from both he and Caballero to the gang members—intimidate Rodriguez and rehearse your testimony.

Flores contends we cannot affirm his conviction for intimidating a witness because we cannot determine whether the jurors based their verdict on a legally valid theory. The instructions stated the jury could convict Flores if he conspired with Caballero, Fabela, or Gollas. Flores claims Gollas as a matter of law could not be a participant in the conspiracy because at the time he accepted Flores's note, he was acting as a government informant and not a coconspirator. Flores asserts we must reverse because we cannot determine whether the jury unanimously found him guilty based on a conspiracy with someone other than Gollas.

In this instance, whether Gollas was acting as a government informer is irrelevant. Flores is correct that where only two persons are involved, "and one is a government agent or informer, the other cannot be convicted of conspiracy." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.) A government agent cannot have the requisite specific intent. (*Ibid.*)

However, this rule does not apply where more than two people are members of the conspiracy, and one of them is a government agent. "[T]he fact that one of a group of alleged coconspirators secretly does not or legally cannot intend to commit the target crime should not be a defense to conspiracy charges or prevent a conspiracy conviction against the others, as long as there are at least two coconspirators involved whose mutual

adherence to the common plan is genuine. [Citations.] [¶] [T]he feigned participation of a false coconspirator or government agent in a conspiracy of more than two people does not negate criminal liability for conspiracy, as long as there are at least two other coconspirators who actually agree to the commission of the subject crime, specifically intend that the crime be committed, and themselves commit at least one overt act for the purpose of accomplishing the object of the conspiracy." (*People v. Liu, supra*, 46 Cal.App.4th at p. 1131.)

Here, Caballero and Flores were members of the conspiracy to intimidate Rodriguez. Substantial evidence supports the jury's finding that both defendants agreed to the commission of the crime, specifically intended the crime to be committed, and, by passing along their notes, committed at least one overt act to further the conspiracy. Thus, whether Gollas was acting as a government informant at the time he took Flores's note does not affect the fact that Flores conspired with Caballero.

Moreover, because there was only one conspiracy, there is no unanimity requirement as to the theory of guilt. "The jury must agree on a 'particular crime' (*People v. Diedrich* [(1982)] 31 Cal.3d [263,] 281); it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' (*People v. Perez* (1993) 21 Cal.App.4th 214, 223.)" (*People v. Russo, supra*, 25 Cal.4th at pp. 1134-1135.)

"Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy. When two or more persons combine to

commit a crime, the jury need not agree on exactly who did what as long as it is convinced a particular defendant committed the crime regardless of what that defendant's precise role may have been." (*People v. Russo, supra*, 25 Cal.4th at pp. 1135-1136.)

Here, substantial evidence supports the jury's finding that Flores conspired with Caballero to intimidate Rodriguez. Because there was only one conspiracy, we need not inquire whether the jurors relied on a conspiracy with Gollas to uphold the verdict.

III

Jury Instructions

Flores contends the trial court's instruction on the law of aider and abettor felony murder was incorrect under recent amendments to the murder statutes, and both defendants claim the court incorrectly instructed on conspiracy to intimidate a witness by force. Flores's claim must be addressed to the trial court and neither party suffered prejudicial harm from the incorrect conspiracy instruction.

A. Instruction on Felony Murder Based on Natural and Probable Consequences

The prosecutor argued that Flores was guilty of felony murder by aiding and abetting the commission of a felony, the natural and probable consequence of which was murder. The trial court instructed the jury accordingly. Flores contends his second-degree murder conviction cannot stand because, under Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 2 (SB 1437)), aiders and abettors such as himself cannot be convicted of murder under the natural and probable consequences theory. Flores argues SB 1437 applies retroactively to his case and requires this court to reverse his murder conviction.

Flores is not entitled to reversal from this court, as SB 1437 does not apply retroactively on direct appeal. Rather, he must pursue the remedy SB 1437 provides to him: He must file a petition under section 1170.95 in the trial court to obtain relief under SB 1437. (*In re Cobbs* (2019) 41 Cal.App.5th 1073, 1080-1081; *People v. Martinez*

(2019) 31 Cal.App.5th 719, 729-730.) Because Flores's remedy is not with us, we will not address the merits of his contentions under SB 1437.

B. Instructions on Conspiracy to Intimidate a Witness

Defendants correctly argue that when the trial court instructed on the crime of witness intimidation by force or violence, it did not instruct on the force or violence element. The error, however, is harmless beyond a reasonable doubt.

"Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 479-480.) "[A]n instructional error that improperly describes or omits an element of an offense . . . like the vast majority of other constitutional errors, falls within the broad category of trial error subject to *Chapman* review." (*Id.* at pp. 502-503.)

There is no prejudice under *Chapman* when "the omitted element was uncontested and supported by overwhelming evidence[.]" (*Neder v. United States* (1999) 527 U.S. 1, 17 [144 L.Ed.2d. 35].) Here, there was no dispute that Caballero's note threatened violence—shooting at an inhabited dwelling. Caballero knew the charged crime alleged the use of force or violence, and he had an opportunity to present any evidence his wished on the subject. He did not introduce any evidence contradicting the terms of his note.

Moreover, despite the instruction's omission, the jurors understood that to convict, they had to find defendants intimidated the witness by force or violence because the verdict forms so instructed them. Under these circumstances, we cannot find the omission of the element of force or violence in the instruction on the witness intimidation offense was prejudicial error under *Chapman*.

IV

Jury Deliberations

Defendants raise two claims involving the jury's deliberations. In the first, they contend the trial court gave an erroneous response to a jury question. In the second, Caballero asserts the jury mistakenly received a copy of the information and read and considered its allegations of his prior convictions.

A. Response to Jury Question

Defendants claim the court gave a legally incorrect answer to jury question No. 5 regarding witness intimidation. We conclude the claim is forfeited and, alternatively, trial counsel did not render ineffective assistance by not objecting.

1. Background

CALCRIM No. 2622, as provided to the jury, read as follows:

"The defendants are charged in Count Three with conspiracy to commit the crime of intimidating a witness.

"To prove that the defendant is guilty of conspiracy to commit this crime, the People must prove that defendants conspired to:

- "1. Maliciously try to prevent or discourage Jose Rodriguez from attending or giving testimony at trial.
 - "2. Jose Rodriguez was a witness.

"AND

- "3. The defendant knew he was trying to prevent or discourage Jose Rodriguez from attending or giving testimony and intended to do so.
- "A person acts maliciously when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.

"As used here, witness means someone or a person the defendant reasonably believed to be someone:

"• Who knows about the existence or nonexistence of facts relating to a crime."

During deliberations, the jury submitted the following question as its question No. 5: "In the eyes of the law, does <u>discreteting</u> [sic] a witness or having/asking others to change their stories, constitute witness intimidation?" By e-mail, the court told the parties' attorneys its initial thought was "'to inform the jury that it is a factual determination for the jury to decide' and to refer them to the appropriate jury instruction. The court asked counsel to discuss the matter with it the next day.

The following morning, the parties conferred in chambers. According to a settled statement memorializing the hearing, Mr. Staten, counsel for Flores, appeared for Flores and Caballero at the hearing. Mr. Staten agreed with the trial court's assessment that the jury question was a factual determination the jury had to decide. Although he discussed the court's proposed response, he did not object to it. All of the counsel present in the meeting agreed with the court's proposed response. None objected. The court noted in the settled statement "there was, at the end of the day, no objection to the court's response to jury note number five."

The court answered the jury question as follows: "Your question calls for a factual determination that needs to be decided by the jury. Please refer to CALCRIM 2622 pertaining to witness intimidation."

2. Analysis

Defendants claim the trial court's answer to the jury question was incorrect. They assert the question was one of law, and the court should have told the jurors that discrediting a witness did not constitute witness intimidation under section 136.1.

Mr. Staten, representing both defendants when the court considered the jury question, did not object to the court's response. A party's failure to object to a trial court's response to a jury question forfeits the claim on appeal. "When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal.'

[Citations.]" (*People v. Boyce* (2014) 59 Cal.4th 672, 699.)

Counsel not only did not object, he specifically agreed with the court's response. As a result, the claim is also forfeited under the doctrine of invited error. Defendants forfeited the claim by specifically agreeing at trial to the court's handling of the jury's question as the correct response. (*People v. Harris* (2008) 43 Cal.4th 1269, 1317.)

Defendants contend that counsel rendered ineffective assistance by agreeing to the trial court's answer to the jury question. We disagree. To establish ineffective assistance of counsel, defendants must show both (1) deficient performance by trial counsel that fell below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability that they would have obtained a more favorable result but for counsel's alleged deficiencies. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674].)

Defendants cannot show that counsel's agreement with the trial court fell below an objective standard of reasonableness. Both the court and counsel reasonably determined that answering the question risked thrusting the trial court into the jury's role of deliberating whether Caballero had intimidated witnesses. CALCRIM No. 2622 defined the crime as maliciously trying to prevent or discourage a witness from giving testimony. It was the jury's fact-finding function to determine whether a defendant's actions to discredit a witness or have a witness change his or her story under the circumstances amounted to a malicious attempt to prevent or discourage the witness from testifying.

Counsel did not render ineffective assistance by agreeing that the jury's question was a question of fact which the jury was charged to answer.

B. Jury's Reading of the Information

Caballero claims we must reverse his convictions because the jury committed misconduct when, after mistakenly provided with a copy of the information, it considered the information's allegations of Caballero's prior convictions as evidence against him. He also contends the trial court violated Evidence Code section 1150 by admitting the jury foreperson's testimony explaining how the jury considered the priors.

We conclude the error was not juror misconduct and was harmless.

1. Background

The information alleged that Caballero had incurred two prior strike convictions for assault with force likely to cause great bodily injury while participating in gang activity. (§§ 245, subd. (a)(1); 186.22.) The allegations stated Caballero was eligible for "a three-strikes life sentence[.]"

The trial court bifurcated trial on the allegations. It also ruled that Caballero's priors would not be presented to the jury either for their truth, due to the bifurcation, or through the gang expert. The priors could be admitted only to impeach Caballero if he testified. He did not testify.

As part of instructing on reasonable doubt, the court informed the jurors that the existence of a criminal charge against the defendants was not evidence the charge was true. The jurors were not to be biased just because the defendants had been arrested, charged with a crime, or brought to trial.

After trial, the court discovered that an unredacted copy of the information had been included with the jury verdicts that were given to the jury for deliberations. The court convened a hearing to question the jury foreperson about the matter. The foreperson stated that during deliberations, she read the information in its entirety and the

jurors discussed it. Everyone had a chance to read it, ask questions about it, and talk about it.

The jurors read the prior conviction allegations and discussed them, but "not in great depth." The foreperson stated, "We did discuss, you know, that they had prior convictions and what had occurred during, you know—I'm sorry. We discussed these, about how they were involved in other—these other charges, these other activities. [¶] . . . [¶] And it came up a couple of times during the deliberations but we didn't, like, really focus on it, you know what I mean. We didn't hype—I don't want to say hyperfocus, but we took that all into consideration while we were deliberating and making [our] decision."

The foreperson further stated, "The prior convictions were discussed during the deliberations, and we discussed that they were previously—the convictions, they were previously in prison, you know, because of those and there was gang-related activity."

The foreperson said the jurors assumed that the prior convictions were based on the contacts they had heard the police officers testify to in court. No one discussed whether the alleged priors were based on information they had not heard at trial. That the allegations used the word "strike" did not affect their decision "in any way and it wasn't discussed in any detail."

The foreperson stated the jurors assumed that Caballero had been convicted of the priors alleged in the information. Asked if that was a factor that was discussed by the jury in arriving at its verdict, the foreperson said, "I'd say we discussed it. When it came down to really the hardcore deliberations, it was purely about what occurred regarding this case specifically and not the priors. [¶] . . . [¶] So we based it all on the evidence that we were given. The evidence that we heard in court."

Following the foreperson's testimony, the defendants moved for a new trial. The trial court denied the motions. The court stated: "So there was an error here, an error of ordinary error, so therefore prejudice must be demonstrated.

"Given the strength of the evidence of the trial with regard to both defendants and the fact that the jurors erroneously did read and did consider the charging document, does not show that there is a reasonable probability of a more favorable outcome to the defendants. There has been an insufficient showing of prejudice.

"The foreperson, Juror No. 12, testified that they assumed that the priors were the priors that they heard in court. They did not recognize them as being different. They based their verdict solely on the evidence presented in court.

"And I should point out for the record that the strike language that she was questioned about in the prior allegations and the information, that language was not discussed nor did it affect their decision.

"The Court is finding that there is also no showing that they used this information of the prior acts in any way other than how they were instructed to use the evidence of the prior acts. So there being an insufficient showing of prejudice, the motion for new trial is denied"

2. Analysis

We review independently the trial court's denial of a motion for new trial alleging juror misconduct. (*People v. Gamache* (2010) 48 Cal.4th 347, 396 (*Gamache*).) However, we accept the court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*Ibid.*)

There is no dispute that providing the unredacted information to the jury during deliberations was error. The jury should not have been allowed to consider extrinsic evidence in reaching its verdict. (*Gamache, supra*, 48 Cal.4th at p. 396.) "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . . [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant

shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [13 L.Ed.2d 424, citations and fn. omitted.)

a. Juror misconduct

Caballero contends the error constituted jury misconduct. He argues a juror's failure to obey court instructions on the law constitutes misconduct, and the jurors here violated the court's instruction under CALCRIM No. 220, the reasonable doubt instruction. Part of that instruction states: "The fact that a criminal charge has been filed against the defendants is not evidence that the charge is true." Caballero argues the jury violated this instruction by considering the prior conviction allegations as evidence and assuming them to be true.

Whether the error amounted to jury misconduct is consequential. "Juror misconduct gives rise to a presumption of prejudice (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425); the prosecution must rebut the presumption by demonstrating 'there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment' (*People v. Clair* (1992) 2 Cal.4th 629, 668; see *People v. Marshall* (1990) 50 Cal.3d 907, 949). In contrast, in the absence of misconduct, the burden remains with the defendant to demonstrate prejudice under the usual standard for ordinary trial error. (*Clair*, at p. 668; *People v. Cooper* [(1991)] 53 Cal.3d [771,] 836.)" (*Gamache, supra*, 48 Cal.4th at p. 397.)

The error was not misconduct. The California Supreme Court has "consistently pardoned jurors for considering extrinsic evidence that finds its way into the jury room through party or court error." (*Gamache, supra*, 48 Cal.4th at p. 397.) This is true even when the extrinsic evidence exposes the defendant's prior convictions to the jury. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1213-1214 [court's inadvertent submission of

transcript to the jury that mentioned the defendant's parole status and prior conviction was ordinary error, not jury misconduct]; *People v. Clair, supra*, 2 Cal.4th at pp. 667-668 [court's inadvertent submission of unredacted audio tape and recording of a conversation that mentioned burglary and assault allegedly committed by the defendant was ordinary error, not jury misconduct]; *People v. Jordan* (2003) 108 Cal.App.4th 349, 363-364 [inadvertent submission of a police report that disclosed the defendant was on parole for robbery was ordinary error, not jury misconduct].)

Caballero nonetheless argues the error was misconduct because the jury violated the reasonable doubt instruction by considering the prior conviction allegations to be true. The California Supreme Court rejected this argument in *Gamache*. In that case, court staff inadvertently gave the jury a videotape of a police interview that had not been admitted into evidence. (*Gamache, supra*, 48 Cal.4th at pp. 395-396.) The defendant claimed the jury's viewing of the videotape constituted misconduct as it violated the court's instruction not to consider outside evidence, and the jury should have recognized the videotape was not something they had seen during trial. (CALJIC No. 1.03.) (*Id.* at p. 399.)

The Supreme Court disagreed and found the error to be ordinary error. "When . . . a jury innocently considers evidence it was inadvertently given, there is no misconduct." (*Gamache, supra*, 48 Cal.4th at p. 398, quoting *People v. Cooper, supra*, 53 Cal.3d at p. 836.) In contrast, the high court has found juror misconduct "where a juror actively or passively obtains information about a case from *outside* sources." (*Id.* at p. 398, original italics.)

Despite the jury instruction not to consider outside evidence, the *Gamache* court held that the placement of the tape in the jury room "suggested to the jurors it was something they were supposed to have The jurors were not lawyers, nor were they privy to any stipulations the parties might have made about what could or could not be taken into the jury room. They thus had little reason to think the . . . videotape was

'outside' evidence they should not consider. . . . [T]his was ordinary error. Accordingly, no presumption of prejudice applies." (*Id.*, 48 Cal.4th at p. 399.)

Similarly, here, the placement of the unredacted information in the jury room suggested to the jurors that the information was something they were supposed to have and consider. They were unaware of the trial court's ruling that prohibited the parties from introducing evidence of the priors or that the priors would be tried in a bifurcated hearing. Because the information was submitted along with the jury verdicts, the jurors reasonably could have concluded the court had permitted them to consider the information as part of their deliberations.

Caballero claims that, unlike the jury in *Gamache* that had little reason to think the evidence was from outside and thus could apply the jury instruction prohibiting it, his jury was aware from CALCRIM No. 220 that it should not consider the filing of a criminal charge as evidence that the charge is true, and the jury violated that instruction.

We are not convinced the jury would have necessarily understood CALCRIM No. 220 to apply to prior conviction allegations in these circumstances. CALCRIM No. 220 is the reasonable doubt instruction. In context, it applies to the case the jury is adjudicating, not other convictions. It reads:

"The fact that a criminal charge has been filed against the defendants is not evidence that the charge is true. You must not be biased against the defendants just because they have been arrested, charged with a crime, or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you must find them not guilty."

The instruction says nothing about prior convictions. It tells the jury not to be biased against defendant due to his being arrested, charged, and brought to trial, and it directs the jury to consider all the evidence that was received throughout the entire trial to determine reasonable doubt. The jurors could have reasonably understood this directive to refer to the current charges against Caballero, not his prior convictions.

In addition, the jury had heard most of the information before. The court read the information to the jurors at voir dire without mentioning the priors, and thus the jury could have reasonably believed the information, provided to them during deliberations, was part of the evidence they could consider. We cannot conclude on this record that jurors who read the information that was inadvertently provided to them violated CALCRIM No. 220 and committed misconduct thereby.

Caballero argues that by granting the defendants' motions to bifurcate the trial of their prior convictions from the trial of the charged offenses, the trial court "necessarily must have found that undue prejudice would accrue to the defendants if the motion were denied." Not so. "We recognize that the trial court had effectively determined that the references were unduly prejudicial. That determination—which we shall treat as sound—was simply an assessment that any benefit promised was not worth the cost threatened. It was not a decision that any harm would necessarily arise." (*People v. Clair, supra*, 2 Cal.4th at pp. 668-669.)

b. Evidence Code section 1150

Having concluded the error did not amount to juror misconduct, we turn to review the record to determine if the error was prejudicial as ordinary error. Before doing so, we must first define the record. Caballero claims the trial court erroneously admitted the foreperson's testimony regarding the allegations' effect on the verdicts, in violation of Evidence Code section 1150. He also asserts his trial counsel rendered ineffective assistance by not objecting to the foreperson's testimony.

Evidence Code section 1150 limits a court from admitting evidence of a juror's thought processes when a party challenges a verdict's validity. Subdivision (a) of that statute states: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

"This statute distinguishes 'between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved ' [Citation.] 'This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.' [Citations.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

"The rule prohibiting impeachment of a verdict by examining the jurors' mental processes is one of substantive law. The jurors' deliberations, '"their expressions, arguments, motives and beliefs represent that state of mind which must precede every legal act and is in itself of no jural consequence." '[Citations.] 'Thus, the rule renders the jurors' subjective thought processes immaterial and of no jural consequence.' "(People v. Steele, supra, 27 Cal.4th at pp. 1263-1264, quoting People v. Hill (1992)

3 Cal.App.4th 16, 30, overruled on another point in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

Evidence Code section 1150 applies to appellate courts that review the record independently from a denial of a new trial motion. (See *People v. Danks* (2004) 32 Cal.4th 269, 298, fn 9, 301-302.) Because evidence that violates Evidence Code section 1150 is "of no jural consequence" and irrelevant, a party is not required to object at trial to preserve this contention on appeal. (*People v. Johnson* (2013) 222 Cal.App.4th 486, 494.)

Much of the foreperson's testimony was inadmissible under Evidence Code section 1150. It concerned the jurors' thought-processes and assumptions upon reading and discussing the priors. Thus, in reaching our decision, we do not consider whether the jurors assumed the priors were the gang offenses testified to in court, whether the word "strike" affected their decision, whether the jurors assumed the prior conviction allegations were true, and whether the jurors disregarded the priors when reaching their verdicts.

The foreperson's admissible testimony, which we may consider under Evidence Code section 1150, consisted of the following: The unredacted information was shared with all the jurors. The foreperson read it and the jurors discussed it. They discussed the prior conviction allegations and how the defendants were involved in these prior activities, but they did not discuss the allegations in great depth. They discussed that the defendants were previously in prison because of the convictions and that there was gangrelated activity. The jurors discussed that the defendants had been convicted of the priors.

c. Prejudice

Generally, the "[e]rroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that, absent the error, a result more favorable to the

defendant would have been reached." (*People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

The evidence against Caballero was so strong that it was not reasonably probable he would have received a more favorable result had the jury not read and discussed the prior conviction allegations. The victim's girlfriend and eyewitness identified Caballero as the shooter. Flores and Melendrez told Ojeda after the shooting that Caballero had shot someone. Caballero admitted to Ojeda that he shot the victim because he felt disrespected. He later admitted to Gollas in jail that he was incarcerated because he had shot a Sureño.

Shortly after the murder, Caballero was seen with a .22 caliber revolver—the same caliber as the bullets found in the victim's body and at the crime scene. Caballero further revealed his consciousness of guilt after the murder by washing his bloody sweatshirt, discarding the revolver, and telling Ojeda not to be a snitch.

Once in jail, Caballero directed his Norteño cohorts to support his alibi without "go[ing] overboard," that "something will need to be done" to stop a witness from testifying against him, and to send "maybe a message to his house by an anonymous person shooting it." Caballero emphasized, "Imagination will be needed so it cannot be traced to homies or us."

Under these facts, we cannot say it was reasonably likely that Caballero would have received a more favorable verdict had the jury not read and discussed the information's prior conviction allegations.

V

Sentencing Claims

Both defendants raise claims against their sentencing. Both ask us to remand for the trial court to consider striking the firearm enhancements under Senate Bill No. 620, and Flores asks us to remand for the trial court to consider striking his enhancement for a serious felony prior under Senate Bill No. 1393. Both defendants also ask us to remand under *People v. Dueñas* (2019) 30 Cal.App.5th 1157, for the trial court to consider whether they can pay the fines and fees imposed on them. We reject each argument.

A. Senate Bill Nos. 620, 1393

Defendants' sentences include firearm enhancements of 25-years-to-life imposed under section 12022.53, and Flores's sentence includes a serious felony prior enhancement of five years imposed under section 667, subdivision (a). Defendants ask us to remand so the trial court may consider exercising its discretion granted by recent legislation to strike the enhancements.

Prior to 2018, the superior court was barred from striking those enhancements. On January 1, 2018, Senate Bill No. 620 (SB 620) became effective. (Stats. 2017, ch. 682, §§ 1-2.) That measure vested the court with discretion to strike firearm enhancements imposed under section 12022.53. (§ 12022.53, subd. (h).)

On January 1, 2019, Senate Bill No. 1393 (SB 1393) became effective. (Stats. 2018, ch. 1013, §§ 1-2.) That law vested the court with discretion to strike enhancements for prior serious felony convictions imposed under section 667. (§§ 667, subd. (f)(2); 1385, subd. (b)(1).)

Both SB 620 and SB 1393 apply retroactively to defendants, as they became effective before this case is final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

Remand, however, is not automatic. We need not remand if the "record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; see *People v. Jones* (2019) 32 Cal.App.5th 267, 272-273.) We review the trial court's statements and sentencing decisions to see if the court clearly indicated its intent not to strike the enhancement if it had the discretion to do so.

We agree with the Attorney General that the trial court indicated by its statements and sentencing decisions that it would not have stricken the firearm and serious felony prior enhancements. The court stated, "Mr. Caballero and Mr. Flores, in this case you looked for, you hunted for somebody, and . . . you killed him in cold blood, so for that you are going to spend the rest of your lives in prison." The court imposed consecutive sentences on all nonstayed offenses and did not strike any of defendants' prior convictions.

These statements and decisions indicate the trial court would not have stricken the enhancements if it had the discretion to do so. Striking the enhancements would increase the chances that defendants could be paroled during their lifetimes due to the completion of their sentences or reductions to their terms by postconviction relief or retroactive legislative changes. (See *People v. McDaniels, supra*, 22 Cal.App.5th at p. 427.) The court made clear its intent that defendants not be paroled and that their sentences not be shortened.

This record thus discloses that the trial court would not strike the firearm and serious felony prior enhancements if given the opportunity to do so under SB 620 and SB 1393. We will not remand for these purposes.

B. Dueñas

The trial court imposed restitution and parole revocation fines and various fees. Defendants contend the court erred in doing so without first determining their ability to pay, a requirement announced in *Dueñas*, *supra*, 30 Cal.App.5th 1157. There, the court held that it was a violation of the defendant's right to due process to impose a restitution fine and court operations and facilities assessments without first determining the convicted defendant's ability to pay. (*Id.* at p. 1168.)

Citing *Dueñas*, defendants contend the case must be returned to the trial court for a hearing on their ability to pay the fines and fees ordered by the trial court and that his

argument has not been forfeited on appeal. The Attorney General, on the other hand, argues, among other things, that defendants forfeited this assertion of error.

We need not decide the forfeiture issue because we hold that *Dueñas* was wrongly decided regarding the issue of hearings on the ability to pay fines and fees before they are ordered by the trial court.

Dueñas held that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under []section 1465.8 and Government Code section 70373." (Dueñas, supra, 30 Cal.App.5th at p. 1164.) The Dueñas court also held "that although []section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (Ibid.)

The *Dueñas* opinion relies on a line of authorities beginning with *Griffin v. Illinois* (1956) 351 U.S. 12 [100 L.Ed. 891] (*Griffin*), which itself rested on the "'constitutional guaranties of due process and equal protection'" and struck down a state practice of granting appellate review only to individuals who could afford a trial transcript. (*Griffin*, at pp. 13, 17; see *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1166-1169.) As recent appellate court cases have illustrated, the authorities *Dueñas* cites involving the right of access to courts are inapplicable because the imposition of the fine and assessments at issue in *Dueñas* and in this proceeding do not deny defendants access to the courts. (*People v. Hicks* (2019) 40 Cal.App.5th 320, 326, review granted Nov. 26, 2019, No. S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1068-1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 927; see also *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1039 (conc. opn. of Benke, J.).)

Griffin also stated broadly, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (*Griffin, supra*, 351 U.S. at p. 19.) Another line of cases relied upon by *Dueñas* is related by this "principle of 'equal justice' " and prohibits imprisonment based on the failure to pay criminal penalties where the nonpayment was due to indigence. (*Bearden v. Georgia* (1983) 461 U.S. 660, 661-662, 664 [76 L.Ed.2d 221]; accord *In re Antazo* (1970) 3 Cal.3d 100, 103-106, 109-110; see *Dueñas, supra*, 30 Cal.App.5th at pp. 1166-1168.)

These authorities prohibiting incarceration for indigence alone are also inapplicable because the fine and assessments at issue in *Dueñas* and this appeal subject an indigent defendant "only to a civil judgment that she [or he] cannot satisfy." (*Dueñas, supra*, at p. 1167; *People v. Hicks, supra*, 40 Cal.App.5th at p. 326, review granted; *People v. Caceres, supra*, 39 Cal.App.5th at p. 927.) Indeed, in *In re Antazo, supra*, 3 Cal.3d 100, our Supreme Court granted a petition for writ of habeas corpus only to discharge the petitioner from his imprisonment resulting from his inability to pay the fine and penalty assessment imposed as a condition of probation, but it did not relieve him from any obligations in his probation order. (*Id.* at p. 117.) The court explained, "[W]e *do not* hold that the imposition upon an indigent offender of a fine and penalty assessment, either as a sentence or as a condition of probation, constitutes of necessity in all instances a violation of the equal protection clause." (*Id.* at p. 116, italics added.) In other words, "*Dueñas* does more than go beyond its foundations; it announces a principle inconsistent with them." (*People v. Hicks, supra*, 40 Cal.App.5th at p. 327, review granted.)

Further, "the fundamental policy question presented in *Dueñas* is a nettlesome one—namely, under what circumstance is it appropriate to require criminal defendants, many of whom are people of little or no means, to pay assessments that help defray the costs of operating the court system and restitution fines that pour into a statewide fund that helps crime victims?" (*People v. Hicks, supra,* 40 Cal.App.5th at p. 328, review

granted.) This "is a question to which . . . the federal and California Constitutions do not speak and thus have left to our Legislature." (*Id.* at p. 329, review granted.)

We join those authorities that have concluded that the principles of due process do not supply a procedure for objecting to the fines and assessments at issue in *Dueñas* and in this proceeding based on the present ability to pay. (*People v. Hicks, supra*, 40 Cal.App.5th at p. 329, review granted; *People v. Aviles, supra*, 39 Cal.App.5th at p. 1069; *People v. Caceres, supra*, 39 Cal.App.5th at p. 928.) To the extent it announced this broad rule, *Dueñas* was wrongly decided, and defendants' claims pursuant thereto is without merit.

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

MAURO, J., Concurring and Dissenting.

I fully concur in the majority opinion except for part V, subpart B of the Discussion, pertaining to fines, fees and assessments, as to which I dissent.

The parties note that defendants were sentenced in November 2015, and that minimum fines, fees and assessments had been requested, but the trial court imposed fines well above the minimum. In *People v. Dueñas* (2019) 30 Cal.App.5th 1157, the court held it is improper to impose certain fines or assessments without determining defendant's ability to pay. (*Id.* at pp. 1168, 1172.) Although some courts have subsequently criticized *Dueñas*'s legal analysis (see, e.g., *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted Nov. 26, 2019, S258946), *Dueñas* remains citable precedent. Until the California Supreme Court has had an opportunity to resolve the current split in authority, I would remand the matter to give the trial court an opportunity to consider defendants' ability to pay the imposed fines and assessments.

MAURO, J.		

RENNER, J., Concurring and Dissenting.

I concur in all parts of the Discussion except the majority's analysis in part V, subpart A. As to part V, subpart A, I dissent.

I disagree with the majority's conclusion that the trial court clearly indicated when it originally sentenced defendants that it would not have stricken the firearm enhancement imposed under Penal Code section 12022.53 or the prior serious felony conviction enhancement imposed under Penal Code section 667, subdivision (a) had it been possible to do so at the time of this sentencing.

The court's broad statement that defendants were "going to spend the rest of [their] lives in prison" is potentially suggestive, but the record nevertheless does not clearly indicate that the court would not have exercised its discretion to strike or dismiss these enhancements. Moreover, "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [remand appropriate because the record did not clearly indicate the court would have imposed the same sentence had it been aware of the full scope of its discretion after a change in the law].)

Accordingly, I would remand for the trial court to exercise its informed discretion as to whether to strike the enhancements.

RENNER, J.	